DATO' HAMZAH ABDUL MAJID & ANOR

v.

WEMBLEY INDUSTRIES HOLDINGS BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
KL REKHRAJ J
[CIVIL SUIT NO: D6-22-1364-97]
20 JANUARY 1998

CIVIL PROCEDURE: *Injunction - Ex parte interlocutory injunction - To restrain extraordinary general meeting of a company - Rules of the High Court 1980, O. 29 r. 2C - Prohibitions - Discretion of court - Non-disclosure of facts*

COMPANY LAW: *Directors - Removal - Companies Act 1965, s. 128 - Class shareholders - Representation*

The plaintiffs were the shareholders and directors of the 1st defendant. They received a notification of an intended resolution to have them removed as directors of the 1st defendant at an extraordinary general meeting. The plaintiffs filed an *ex parte* summons in chambers and alleged *inter alia*, that the proceedings of the intended proposed resolution was *ultra vires* s. 128 of the Companies Act 1965 ('the Act'). The plaintiffs claimed that they represented a particular class or category of shareholders in the 1st defendant company, and that s. 128 of the Act prevented their such removal; as that section requires directors or representatives of a particular class of shareholders to remain in office until a successor is appointed; whereas in the instant case no such attempt had been made to first appoint a successor who could effectively protect the plaintiffs' shareholding. An *ex parte* order was granted to the plaintiffs because of the submission. It was later discovered that the plaintiffs were not the representatives of class shareholders but were representatives and directors in their own cause. The defendants thus moved the court to set aside the *ex parte* injunctive order. The question that arose was whether the court had the jurisdiction to discharge the interlocutory *ex parte* injunction.

Held:

[1] Order 29 r. 2C of the Rules of the High Court 1980 ('the RHC') prohibits the granting of *ex parte* injunctions against corporations, the total effect of which is to stop the holding or progress of meetings.

[2] Notwithstanding the general limitations of O. 29 r. 2C of the RHC, the High Court has an unlimited and unfettered discretion to grant an interlocutory injunction on an *ex parte* application if it is a case of sufficient urgency to maintain the *status quo* pending the hearing of *inter partes* applications.

[3] Non-disclosure of material and cogent relevant facts is a ground to set aside an *ex parte* injunction.

[4] As the plaintiffs were not the representatives of class shareholders but were representatives and directors in their own cause, the proceedings of the intended resolution was not *ultra vires* s. 128 of the Act but was within the scope of O. 29 r. 2C of the RHC.

[Ex parte injunction set aside.]

Case referred to:
London City Agency (JCD) Ltd & Anor v. Lee & Ors [1970] 1 Ch 597 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 128
Rules of the High Court 1980, O. 29 r. 2C

For the plaintiffs - Deepak Sadasivan (RG D'Cruz with him); M/s Adnan, Sundra & Low
For the 1st defendant - Loh Siew Cheang (Robert Low with him); M/s Cheang & Ariff
For the 2nd & 9th defendants - Gopal Sreenevasan (Charmaine Chow with him); M/s Srivananthan

Reported by Hjh Siti Faridah Abd Jabbar

JUDGMENT

KL Rekhraj J:

The plaintiffs are the shareholders and directors of the first-named defendants; collectively holding between themselves 26,400,000; being 18.9 per cent of the first defendants issued and paid-up capital.

The plaintiffs claim this to be a derivative action brought for the benefit of the first-named defendant by affirming that on or about 10 October 1997; they received a notification of an intended resolution to have them removed as directors of the first defendant at the Extraordinary General Meeting to be held on 22 December 1997, at 10.30am. That this exercise or the act on the part of the defendants was not in the interest of the first defendant but was being proceeded for an improper and or collateral purpose in the interest of the

third, fourth and fifth named defendants; alleging *inter alia* Breaches of Fiduciary Duties; and Fraud on a Power on the part of the defendants in their removal. The plaintiffs further alleged that they represented a particular class or category of shareholders in the first defendant company, and that s. 128 of the Companies Act 1965 prevented their such removal; as that section required directors or representatives of a particular class of shareholders to remain in office until a successor is appointed; whereas in the instant case no such attempt has been made to first appoint a successor who can effectively protect the plaintiffs' shareholding; and claiming various prayers; one of which was an order restraining the second named defendant from using its voting power under the resolution to remove the plaintiffs as directors of the first defendant until the guarantee proceedings have been resolved.

The plaintiffs filed an *ex parte* summons in chambers on 15 December 1997, at 3.37pm supported by an urgent application under a certificate of urgency for the hearing; and pursuant thereto the said summons in chambers was heard on 16 December 1997 at 10am; and an *ex parte* order was granted only because of the representation or submission, that the plaintiffs were Class Directors; and their removal was against the rule of law under s. 128 of the Companies Act 1965.

Having granted the order at 10.30am on 16 December 1997; I expected; because of the urgency expressed in the certificate in support; the plaintiffs solicitors to immediately proceed to serve on the defendants the injunctive order; but instead they waited for four days and only served at about 11.30pm on Saturday, 20 December 1997 when knowing fully well that the meeting was fixed for Monday morning; thereby giving the defendants hardly anytime to impeach or set aside the order.

It is also of special note here that the defendants have through their solicitors, as early as the 11 December 1997; and with further reminder notification dated 17 December 1997, had put the plaintiffs on notice, that if the plaintiffs intended or desired to make any application to the court; the said solicitors had instructions to accept any service of process.

In answer to the said notification; the plaintiffs solicitors on 18 December 1997, wrote a reply stating that they had no intention to apply for any interlocutory relief against the first defendant – totally failing even then to notify that they have infact obtained such an order *ex parte* on 16 December 1997.

The plaintiffs solicitors conduct in the delay in service of the order upon the defendants and shrouding themselves in the cloak of secrecy for reasons best known to them is not only most unbecoming of a noble profession; but was also shrouded by non-disclosure to the court of that notification in their application for an *ex parte* urgent application, of the fact of such correspondences; so that the court could have instead directed that the said solicitors, being on notification could be made to be present at the hearing of the *ex parte* application.

Non-disclosure of material and cogent relevant facts; is itself a ground to set aside an *ex parte* injunction in these circumstances.

The defendants solicitors – notwithstanding the weekend; proceeded to fax to the plaintiffs solicitors of their intention to appear before the judge on Monday morning at 9 to set aside the *ex parte* injuncted order; and did appear to move the court.

The question that confronted the court was whether the court had jurisdiction to discharge an interlocutory *ex parte* injunction; and it was submitted by the defendants solicitors relying on the case of *London City Agency (JCD) Ltd & Anor v. Lee & Ors.* [1970] 1 Ch. p. 597, that there was no rule of practice to prevent the court from granting such an application *ex parte* in a case of sufficient urgency; more for the fact the plaintiffs solicitors had failed to make a sufficient disclosure of the defendants solicitors notifications to accept service of any proceedings; and in their deliberate misleading the court on the statement that the plaintiffs were directors representing a group of class shareholders and as such could only be removed by those class shareholders.

Had it not been for that representation; the court would not have granted the prayer; as O. 29 r. 2C Rules of the High Court 1980 prohibits the granting of such injunctions against corporations on *ex parte* application, the total effect of which was to stop the holding or progress of the meetings.

To my mind notwithstanding the general limitations of the O. 29 r. 2C Rules of the High Court the court has an unlimited and unfettered discretion to grant an interlocutory injunction on an *ex parte* application if it appears to the court of the cogent reasons and if it is a case of sufficient urgency to maintain the *status quo* pending the hearing of *inter partes* application; more for the fact the representation made in this case was of a particular nature that the defendant's intended resolution in the removal of the plaintiffs as directors appeared to be *ultra vires* s. 128 of the Companies Act 1965.

As there was sufficient cogency in the hearing in the disposal of this *ex parte* application, to set aside the *ex parte* injunctive order dated 16 December 1997; I took the liberty to contact the plaintiffs law firm to verify as to their receipt of any notification of this urgent application to set aside the *ex parte* order and was told that the solicitors concerned were away to a meeting.

However, within fifteen minutes of that call, a Mr. R.G. D'Cruz who appeared with Mr. Deepak Sadasivan on 16 December 1997, appeared in my chambers and confirmed of the receipt of the faxes from the defendants solicitors; but took a preliminary point that the remedy of the defendants was instead to lodge an appeal and not by proceeding to set aside the *ex parte* order.

He also conceded to the submission of Mr. Loh Siew Cheang, for the defendants; that the plaintiffs were not the representatives of class shareholders; but were representatives and directors in their own cause.

In view of this admission; the proceeding of the intended proposed resolution no longer became *ultra vires* of s. 128 of the Companies Act; but within the scope of O. 29 r. 2C, and I accordingly set aside the *ex parte* injunction with costs to the defendants.